Supreme Court U.S.
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No. 98 1322 FEB 16 '99

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

CECIL BOWMAN,

Petitioner,

v.

ROBERT ANDERSON, in his official capacity,
As Chairman of the Oklahoma Tax Commission,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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35pp

QUESTION PRESENTED

I. Whether the Appeals Court sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings requiring an examination of the evidence prior to rendering judgment.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

APPENDIX

Appendix A - Order of the United States District Court for the Western District of Oklahoma dated January 26,1998

Appendix B - Order of the United States District Court for the Western District of Oklahoma dated May 4, 1998

Appendix C - Opinion of the United States Court of Appeals for the Tenth Circuit dated November 18, 1998.

Appendix D - Motion to Reconsider in district court, dated February 5, 1998.

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To The United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cecil Bowman, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The United States District Court for Western District of Oklahoma granted judgment in favor of the Tax Commission on January 26, 1998 (Appendix "A"). Bowman filed a motion for reconsideration and the same was denied on May 4, 1998 (Appendix "B"). Thereafter Bowman filed his notice of appeal on May 11, 1998 to the United States Court of Appeals for the Tenth Circuit. On November 18, 1998, the Appeals Court affirmed the decision of the District Court. (Appendix "C").

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is November 18, 1998. The court from which relief is sought is the United States Court of Appeals for the Tenth Circuit. This Court has jurisdiction pursuant to 28 United States Code § 1254.

STATUTE INVOLVED

Federal Rules of Civil Procedure, Rule 56.

STATEMENT OF THE CASE

The Appellate Court's jurisdiction was invoked pursuant to FRAP Rule 3. The standard of review for an appeal from a summary judgment is de novo. The Court of Appeals applied McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998).

Bowman was at all times relevant to this action an employee of the Oklahoma Tax Commission. He had applied for promotion on numerous occasions and had been denied.

Bowman brought this action in district court, alleging that the Tax Commission had unlawfully discriminated against him in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.. §§ 621-634, and Title VII, 42 U.S.C. §§ 2000e to 2000e-17. The district court granted the Tax Commission's motion for summary judgment, and the same was affirmed by the appeals court. For the reasons discussed below, Bowman petitions this Honorable Court for writ of certiorari.

REASONS FOR GRANTING WRIT

This Court should grant the writ because both the district court and the appeals court have so far departed from the accepted and usual course of judicial proceedings in deciding and ruling on motions for summary judgment. The rulings below are inconsistent and in opposition to the decisions of this Honorable Court.

Both courts held that Bowman failed to prove that he was qualified for the position; and, both courts failed to even address Bowman's evidence in support of his State Law claim that he had been qualified by successfully passing a state examination, which by State Law qualified him for the position sought.

ARGUMENT

BOTH THE TRIAL COURT AND THE APPEALS COURT FAILED TO ADDRESS THE STATE LAW, STATUTORY, CLAIM OF QUALIFICATIONS FOR THE POSITION IN DISPUTE

This decision by the Tenth Circuit in affirming the trial court runs counter to the decisions of this Court as well

as its own decisions relating to "summary judgment" under these factual circumstances. Bowman is a "war veteran" and pursuant to Oklahoma law. As such, he is afforded the right or privilege to open certain job registers maintained by the Office of Personnel Management. In some instances tests or examinations are given to "war veterans" and upon achieving a passing score, the State of Oklahoma compels the Office of Personnel Management and other agencies to place the name of the "war veteran" on the list of eligibles for the position sought –this is done by state statute. See Appendix "D".

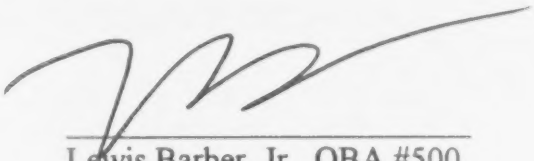
Bowman is entitled to a fair and impartial decision; equal protection under the law and a right to present evidence. Both courts unlawfully deprived him of these constitutionally protected rights by "closing their eyes" to evidence properly presented. Notwithstanding his successful passing the examination, and the scores being a conspicuous part of the record below, both courts held that Bowman failed to prove that he was qualified for the position sought. The examination was given pursuant to the laws of the State of Oklahoma, and that the Tax Commission had recognized Bowman's passing score and so indicated the same in his official personnel file.

CONCLUSION

Wherefore premises considered, Case prays that this Honorable Court reverse the decision of the of the Court of Appeals and remand this case for further proceedings on the

question of whether or not Bowman met certain statutory guidelines upon which he based his qualifications for the position sought.

Respectfully submitted,



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Appendix "A"

ORDER FILED JANUARY 26, 1998

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

Cecil Bowman	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-97-701-L
	)	
Robert Anderson, in his official capacity as Chairman of the Oklahoma Tax Commission	)	
	)	
Defendant.	)	

ORDER

Plaintiff Cecil Bowman brings this action against defendant Robert Anderson, in his official capacity as Chairman of the Oklahoma Tax Commission, alleging that the denial of a promotion to position of Auditor I was the result of age and sex discrimination in violation of federal law as set forth in the Age Discrimination in Employment Act (ADEA), 29 U.S.C.§ 621 et seq., and Title VII,42 U.S C. § 2000e et seq. This matter is before the court on the Motion for Summary Judgment of Defendant. Plaintiff has responded to

the motion for summary judgment. The court has thoroughly reviewed the arguments of the parties as well as the exhibits submitted. Based upon this review, the court determines that defendant is entitled to summary judgment as a matter of law.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509, 91 L. Ed. 2d. 202 (1986). The moving party bears the initial burden of showing that there is an absence of any issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106, S.Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991) If the moving party meets this burden, the non-moving party then has the burden to come forward with specific facts showing that there is a genuine issue for trial as to the elements essential to the non-moving party's case. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct.1348, 1355-56. 89 L. Ed. 2d 538 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F. 2d 887, 891 (10th Cir. 1991). To sustain this burden, the non-moving party cannot rest on the mere allegations in the pleadings. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324, 106 S. Ct. at 2553; Applied Genetics Int'l. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). The non-moving party must point to specific facts, "by any of the kinds of evidentiary materials listed in rule 56(c), except the pleadings themselves, "to avoid summary judgment. Celotex, 477 U.S. at 324.

In a response to a motion for summary judgment, a party cannot rest on ignorance of facts, on speculation, or on

suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. Bryant v. O'Connor, 848 F.2d 1064, 1067 (10th Cir. 1988). The mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party. A litigant must bring to the court's attention some affirmative indication that his or her version of relevant events is not fanciful. Quinn v. Syracuse Model Neighborhood Corp., 613 F. 2d 438, 445 (2d Cir. 1980), cited in Conaway v. Smith, 853 F. 2d 789, 794 (10th Cir. 1988). Allegations alone will not defeat summary judgment. Cone v. Longmont United Hosp. Ass'n., 14 F.3d 526,530 (10th Cir. 1994).

The undisputed facts reveal that plaintiff is an employee of the Oklahoma Tax Commission with the position title of revenue Examiner II. Plaintiff was not promoted to the position of Auditor I which was posted on May 10, 1995, and for which plaintiff applied. Although plaintiff asserts that the facts concerning the applicant pool are irrelevant, there appears to be no dispute that the ten applicants selected for interviews consisted of five males and five females. Five applicants of the ten were over the age of 40 and four of these individuals were over the age of 50. Though not recited in the fact statements of either party, the court has gleaned from the record that plaintiff was 51 at the time he applied for the position at issue. It appears that three candidates from the ten were selected for interviews. Those selected were: (1) Seikel, male, age 50; (2) West, female age 37; and (3) White, female, age 58. Mr. Seikel was ultimately rejected after a review of his qualifications and he was replaced by Daugherty, female, age 29.

The burden shifting scheme outlined in McDonnell Douglas v. Green, 411 U.S. 792, 802, -05 (1973) is

applicable in ADEA cases and is also applied in the Title VII context where it was originally developed. Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 & n.1 (10th Cir.1988) (applying burden shifting proof scheme to age discrimination claim). Under the burden shifting scheme, a plaintiff must first establish a prima facie case by showing that (1) they were within the protected group; (2) they were not hired; (3) they were qualified for the position; and (4) defendant filled the positions with a person outside the protected group. See id at 1547.

If plaintiff can establish a prima facie case, then the burden shifts to defendant to articulate a facially nondiscriminatory reason for not hiring plaintiff. EEOC v. Flasher, 986 F. 2d 1312, 1315-16 (10th Cir. 1992). If defendant articulates such a reason, the burden reverts to plaintiff to establish defendant's discriminatory motivation by either (1) presenting direct evidence that age or sex was a determinative factor in defendant's decision; or (2) presenting evidence upon which a jury could conclude that defendant's proffered explanation is pretextual and unworthy of credence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); Randle v. City of Aurora, 69 F.3d 441, 452 n. 17 (10th Cir. 1995) ("[A] civil rights plaintiff may withstand a motion for summary judgment...if the plaintiff establishes a prima facie case and presents evidence that the defendant's proffered nondiscriminatory reason was pretextual - -i.e., unworthy of belief.").

At the summary judgment stage, if the plaintiff establishes a prima facie case and produces evidence supporting a finding that defendant's alleged nondiscriminatory reasons for the employment decisions are pretextual, the case should go to the fact finder. Ingels v. Thiokol Corp., 42 F.3d 616, 622 (10th Cir. 1994). Therefore,

the court must determine whether plaintiff established a prima facie case on his claims and, if so, whether he has produced sufficient evidence to show that defendant's reasons for not promoting him pretextual.

In order to establish a prima facie case of discriminatory failure to promote under the ADEA, the plaintiff must show that he (1) was within the protected age group at the time of the failure to promote; (2) was qualified for promotion; (3) was not promoted; and (4) was passed over for an available promotion in favor of someone younger. Furr V. AT&T Technologies, Inc., 824 F. 2d 1537, 1542 (10th Cir. 1987).

Defendant asserts that he is entitled to summary judgment because plaintiff has failed to meet the requirements necessary to establish a prima facie case of age or sex discrimination. Specifically, defendant asserts that plaintiff has failed to establish the fourth prong of the test, which is to establish that he was qualified for the position for which he applied. Defendant claim that the undisputed facts demonstrate that plaintiff was not qualified for the position of auditor I because he did not meet the requirement of professional auditing experience.

It is undisputed that plaintiff was within the protected age group at the time he as not promoted. It also appears that the individual who eventually obtained the position of Auditor I was female and under the age of forty. The parties' briefs concentrate on the fourth element, whether plaintiff was qualified for the promotion.

In his affidavit attached to his response, plaintiff states: "I am a 'ten point' veteran which requires that I be notified any time I am disqualified or my name is removed from the register maintained by the Office of Personnel management. I was never notified that I was not eligible for

promotion to the Auditor I position. Conversely, all of my notifications and information show that I was fully qualified for the Auditor I position. Throughout the years, and in particular 1992-1996, I had been carried as fully eligible and qualified to be promoted to the Auditor I position." Plaintiff claims that the first time he heard that he was considered not eligible for the Auditor I position was during deposition testimony given in the present case. Plaintiff points out that defendant relies on a recent (1997) review of his qualifications to justify the earlier (1995) denial of the promotion and argues that the defendant has, "in obvious preparation for litigation, solicited an evaluation from the Office of Personnel Management some two years after Plaintiff was denied a promotion and, of course, said belated evaluation reveals that Plaintiff is not qualified...." Defendant states that, "Any indication of qualification for the Auditor I position which Plaintiff received from the Office of Personnel Management was most likely an error on behalf of the agency." Thus, while it appears that plaintiff may not have in fact been qualified for the position of Auditor I, there is reason to believe that plaintiff may not have been informed of this by his employer.

However, plaintiff has provided the court with conjecture, and no compelling evidence, that the eligibility determination would have differed in any way had it been conducted at the time of plaintiff's non-promotion. In deciding whether an employee is qualified for a position with her employer, it is the perception of the decision maker which is relevant, not the employee's perception of himself. Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988). Even assuming for the sake of argument that plaintiff, as a ten-point veteran, was denied the opportunity to appeal his name's removal from the register of eligible applicants,

this fact alone in no way indicates age or sex discrimination. The plaintiff at all time retains the ultimate burden of proving he was the victim of intentional discrimination. Texas Dept. of Community Affairs v Burdine, 450 U.S. 248, 253 (1981). The court finds that based upon the undisputed facts, plaintiff has failed to show that he was qualified for the position of Auditor I. Having failed to establish a prima facie case, summary judgment in favor of defendant is appropriate.

However, assuming for purpose of argument that plaintiff can establish a prima facie case of discrimination, it is insufficient for purposes of summary judgment for plaintiff to merely establish a prima facie case. Once the presumption raised by the prima facie case is rebutted by nondiscriminatory reasons justifying the employer's actions, the presumption drops out of the picture and the factual inquiry proceeds to a new level of specificity. Hooks v. Diamond crystal Specialty Foods, Inc., 997 F.2d 793, 798 (10th Cir. 1993). The plaintiff may show discrimination either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Id. The court must make a judgment as to whether the evidence, interpreted favorably to the plaintiff, could persuade a reasonable jury that the employer had discriminated against the plaintiff. Id.

Although, as previously stated, the parties' focus is on plaintiff's qualifications as they relate to a prima facie case, it is clear that the proffered reason for the denial of plaintiff's promotion was his lack of experience, particularly auditing experience. Furthermore, defendant's brief addresses its allegation that plaintiff has failed to allege any direct evidence of discrimination.

The court agrees that plaintiff has completely failed to

present any direct evidence of discrimination. Plaintiff has also failed to present evidence from which a finder of fact could conclude that defendant's proffered reasons for not promoting him were pretextual. Plaintiff's statement that, "genuine issues of material fact appears on the face of the pleadings" is, of course, inadequate at this stage of the proceedings to justify presenting his case to a jury. Plaintiff refers to a deposition of a former co-worker indicating that plaintiff "felt" the way the co-worker did, that "younger people, good-looking females, nice-looking young men, regardless of whether the qualifications were better or not, were the ones that were being selected." (Deposition of Shannon Wayne Craighead, attached as an exhibit to plaintiff's brief). Statements of feelings, without more, are inadequate to create an inference that plaintiff was not promoted because of his age or sex. Also, as pointed out by defendant, plaintiff's allegations of discrimination are seriously undercut by the selection of Mr. Seikel, a fifty year old male, to be interviewed for the position of Auditor I. Plaintiff's bald statement that defendant, "knew or should have known when it selected Seikel that he was not qualified for the position "is completely speculative and unsupported by sufficient evidence.

Accordingly, after a thorough review of the evidence presented by the parties, the court finds that plaintiff has failed to create a genuine issue of fact regarding the Defendant's reasons for not promoting him to the Auditor I position. Defendant is entitled to judgment as a matter of law on plaintiff's claims.

In conclusion, Defendant's Motion for summary Judgment is **GRANTED.** Judgment will issue on a separate document in accordance with the federal rules of civil procedure.

It is so ordered the 26th day of January, 1998.

S/TIM LEONARD
United States District Judge

Appendix "B"

ORDER FILED MAY 4, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Cecil Bowman	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-97-701-L
	)	
Robert Anderson, in his official capacity as Chairman of the Oklahoma Tax Commission	)	
	)	
	)	
Defendant.	)	

ORDER

This matter is before the court on the Motion to Reconsider filed by plaintiff Cecil Bowman. Plaintiff asks this court to reconsider its Judgment entered January 26, 1998 which granted summary judgment to defendant Robert Anderson, in his official capacity as Chairman of the Oklahoma Tax Commission. Plaintiff's action alleged job discrimination based on his age and gender.

Plaintiff's motion is purportedly based on Rule 52(b) of the Federal rules of Civil Procedure. However, since Rule 52(b) applies to non-jury actions tried to the court, the court

finds that reference to this Rule is inappropriate. By granting summary judgment in favor of defendant, the court was not conducting a non-jury trial, but rather determined that plaintiff's claims were insufficient to go to trial under the standards set forth in Rule 56. In fact, Rule 52 itself expressly provides that its requirements concerning findings of facts and conclusions of law are unnecessary on decisions of motions under Rule 56. Accordingly, Rule 52(b) provides no basis for plaintiff's Motion to Reconsider and no other authority is referenced.

In addition, the court finds no merit in plaintiff's assertion of error since the court found that, even assuming plaintiff could show a prima facie case, he completely failed to show discrimination either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Establishment of a prima facie case, standing alone, is insufficient at the summary judgment stage.

Accordingly, plaintiff has provided the court with no compelling authority or reason to justify modification of this court's January 26, 1998 Order and Judgment entered in favor of defendant. Plaintiff's Motion to Reconsider is **DENIED.**

It is so ordered the 4th day of May, 1998.

S/TIM LEONARD
United States District Judge

Appendix "C"

ORDER FILED NOVEMBER 18, 1998

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

Cecil Bowman	)	
	)	No. 98-6214
Plaintiff - Appellant	)	(W.D. Oklahoma)
v.	)	Case No. CIV-97-701-L
Robert Anderson, in his official capacity as Chairman of the Oklahoma Tax Commission	)	
Defendant - Appellee	)	

ORDER AND JUDGMENT*

Before **ANDERSON, McKAY,** and **LUCERO,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. Civ. R. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

This case involves an employment dispute between Cecil Bowman and his longtime employer, the Oklahoma Tax Commission. Bowman sought, and was denied, a promotion within the ranks of the Tax commission. After he was denied the promotion, Bowman filed this action in the district court, alleging that the Tax Commission had unlawfully discriminated against him in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and Title VII, 42 U.S.C.§§ 2000e to 2000e-17. The district court granted the Tax Commission's motion for summary judgment, and Bowman appeals. For the reasons discussed below, we affirm the judgment of the district court.

BACKGROUND

The record shows the following facts to be undisputed. After his graduation from high school in 1963, Bowman held various jobs, including district manager for a life insurance company, security investigator for an auto supply company, security officer for a hospital, and manager of a hotel. In 1980, Bowman enrolled in school at The State University of New York at Albany, where he graduated in 1983, earning a degree in business and social science.

Bowman went on to earn a master's degree in law enforcement from Columbia Pacific University. Soon after completing his master's work in 1985, Bowman took a job with the Oklahoma Tax Commission. When he entered the service of the Tax Commission, Bowman held the position of Revenue Examiner I. In 1988, Bowman was promoted to the position of Revenue Examiner II, and he held that position of when, in 1995, he sought a promotion to the position of Auditor I, the promotion at issue in this case.

For persons without an accounting degree, including Bowman, the typical career ladder for promotion within the Oklahoma Tax Commission begins with Revenue Examiner I, and progresses to Revenue Examiner II, Tax Auditor, and eventually to Senior Tax Auditor. The Auditor I position , which Bowman sought in 1995, is the career ladder equivalent of Senior Tax Auditor.

The published requirements for Auditor I position include either (1) "a baccalaureate degree in accounting," (2) "a baccalaureate degree in business or public administration and one year of professional-level auditing experience," or (3) "an equivalent combination of education and experience." Appellant's App. at 116. Before an applicant can be hired for any position with the Tax Commission, the Oklahoma Office of Personnel Management (OPM) must certify that the applicant meets the published qualifications.

Bowman does not have a degree in accounting, and therefore must fit into one of the other two categories. The record reflects that the positions of Revenue Examiner I and Revenue Examiner II are not considered "professional-level auditing experience." Id. at 92 (uncontradicted deposition testimony of Hank Batty).

In 1992, while working as a Revenue Examiner II, Bowman sought certification from OPM that he was qualified

for the Auditor I position. He sat for and passed the required written test, and on April 7, 1992, OPM sent Bowman a letter stating that he was eligible to be considered for the Auditor I position when an opening became available. Id. at 98. Bowman periodically renewed this eligibility, and in 1995, when he applied for the Auditor I position, OPM listed Bowman as qualified and eligible for the position. The Oklahoma Merit Rules for Employment require OPM to give notice to persons who are removed from the qualified list for reasons other than lapse of time, and grant such persons a right of appeal from the decision of removal. The record reflects that Bowman was never notified of any removal from the qualified list.

On or about May 10, 1995, the Tax Commission posted a notice stating that there were three new openings for the Auditor I position. Bowman, along with 25 others, submitted an application for the positions. The record does not reflect the gender and age of all 26 of the applicants. From this pool of 26 applicants, the Tax commission selected ten for personal interviews. Bowman was not selected. The ten interviewed candidates included five men and five women; five of the interviewees were over the age of 40.

The Tax Commission selected three candidates from this pool. The Commission extended offers to a 50-year-old male, a 37-year-old female, and a 58-year-old female. Soon after this selection, OPM discovered, upon review of the three candidates' qualifications, that the 50-year-old male did not qualify for the position. The Tax Commission then tendered an offer to the highest-ranked individual remaining, a 29-year-old female.

On April 29, 1997, Bowman filed this action in the district court. He alleged that the Tax Commission violated his civil rights by denying him a promotion on the basis of his

gender and age. In July 1997, soon after the suit was filed, OPM reviewed Bowman's file to determine why he had been denied the promotion. This review revealed that Bowman did not meet the educational and experience requirements for the Auditor I position. In his deposition, OPM official Hank Batty testified that he did not know why his office had certified Bowman as qualified in 1992. He posited tow possible explanations for this: either Bowman submitted different information in 1992 than he did in 1995, or else someone at OPM had simply made an error in certifying Bowman. Id. at 88. Batty testified that "the most likely" explanation was that OPM made a mistake by certifying Bowman in 1992. Id.

In November 1997, the Tax Commission moved for summary judgment. The district court granted this motion on January 26, 2998, holding that Bowman could not make out a prima facie case of discrimination under either ADEA or Title VII, and that even if he could, there was no evidence in the record which demonstrated that the Commission's proffered reasons for denying Bowman the promotion were pretextual. Bowman appeals this decision of the district court.

STANDARD OF REVIEW

We review a district court's decision to grant summary judgment de novo, using the same legal standard applicable in the district court. See McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128, 1128 (10th Cir. 1998). Summary judgment is proper only in cases where "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

DISCUSSION

I. Title VII

Bowman's first assertion is that he was denied the promotion because of his gender, in violation of Title VII. To make out a case of discrimination under Title VII, a plaintiff must "carry the initial burden... of establishing a prima facie case of ...discrimination." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To make out a prima facie case of gender discrimination, Bowman must show the following: (1) that he belongs to a protected class; (2) that he applied for and was qualified for the position he sought; (3) that, despite his qualifications, he was turned down; and (4) that the employer eventually awarded the promotion to a person of the other gender whose qualifications were no better than his own. See id.; see also Tomsic v. State Farm Mut. Auto Ins. Co., 85 F.3d 1472, 1475 n.3 (10th Cir. 1996); Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1380 (10th Cir. 1994). The district court held that Bowman could not make the required prima facie showing, because he could not show that he was qualified for the Auditor I position. We agree.

It is undisputed that the Auditor I position requires either (1) accounting degree, (2) a business degree coupled with one year of professional-level auditing experience, or (3) "an equivalent combination of education and experience." Appellant's App. at 116. It is also undisputed that Bowman does not have either an accounting degree or one year of professional-level auditing experience. And Bowman does not even attempt to argue, either here or before the district court, that he fits into the third category. Rather, Bowman bases his entire argument on the fact that OPM listed him as

"qualified" for the Auditor I position from 1992. This is simply not enough. Bowman must show that he really is qualified for the position, not merely that OPM, apparently mistakenly, designated him as such. Bowman must put forth some showing that he, in actuality rather than merely according to a bureaucratic ledger, possesses the necessary qualifications for the position. On the record before us, there is simply no evidence to support Bowman's claim. On the contrary, the record is perfectly clear-Bowman did not have the education and experience required for the Auditor I position. Therefore, Bowman cannot make out a prima facie case of gender discrimination, and the district court properly entered summary judgment in favor of the Tax Commission.

Moreover, the district court is entirely correct when it stated that, even assuming that Bowman could make out a prima facie case, the Tax Commission would still be entitled to summary judgment. In order to survive a summary judgment motion, Bowman must establish more than a mere prima facie case. See Lee v. ABF Freight System, Inc., 22 F. 3d 1019, 1022 (10th Cir. 1994); Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 798 (10th Cir. 1993), abrogated in part on other grounds, Buchanan v. Sherrill, 51 F.3d 227, 229 (10th Cir. 1995). Bowman must also produce some evidence which tends to establish that the Tax Commission's proffered reasons for denying him the promotion were pretextual, see Hooks, 997 F.2d at 798; see also Ingels v. Thiokol Corp., 42 F.3d 616, 622 (10th Cir. 1994) (applying similar standards to an ADEA claim), or "must otherwise introduce[] evidence of illegal discriminatory motive," Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1165 (10th Cir. 1998). Bowman "at all times bears the ultimate burden of persuasion." Conner v. Schnuck Mkts., Inc., 121 F.3d 1390, 1396 (10th Cir. 1997) (quoting St. Mary's Honor

Ctr.v. Hicks, 509 U.S. 502m 511 (1993)). The only "evidence" in the record to which Bowman can point is the Tax Commission's (or OPM's) failure to give Bowman the required notice when, by determining in 1995 that he was not qualified, they effectually removed him from the qualified list. See Appellant's Br. at 3-4. The state's failure to notify Bowman that they had erred in placing him on the qualified list may very well have violated Oklahoma's Merit Rules for Employment, [1] but this failure in no way indicates that the state's proffered reason–that Bowman was not qualified–is mere pretext or was in some other manner discriminatory.

To the contrary, the record demonstrates that the Tax Commission acted without discrimination. First of all, as discussed above, there seems to be no real dispute, either on the record or among the parties themselves, that Bowman in actuality, did not meet the published criteria for the Auditor I position. This alone persuades us that the Tax Commission's proffered reason is not pretextual. Second, however, the Tax Commission interviewed ten applicants, five of whom were male and five of whom were female. The Tax Commission tendered an offer to one male applicant. On the record here, there is no evidence, either direct or circumstantial, which tends to show that the Tax Commission discriminated against Bowman on the basis of his gender. Thus, even if Bowman

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Because the issue is not before us, we express no opinion on whether there was any violation of the Oklahoma Merit Rules for Employment, or what the remedy would be if there were such a violation. We make mention of the issue only to point out that evidence of such a Rules violation does not necessarily raise an inference of gender or age discrimination and that a federal civil rights lawsuit is not the proper forum to pursue violations of such Rules.

could have made a prima facie case, summary judgment would still have been appropriate.

II. ADEA

Bowman's next contention is that the Tax Commission discriminated against him on the basis of his age, in violation of ADEA. We analyze Bowman's ADEA claim under standards remarkably similar to the Title VII standards. ADEA plaintiffs, like Title VII plaintiffs, must make an initial prima facie showing. See McKnight, 149 F.3d at 1128 (stating that "[i]n evaluating ADEA claims, the Tenth Circuit uses" the McDonnell Douglas burden-shifting analysis). Bowman must show that "he (1) was within the protected age group at the time of the failure to promote: (2) was qualified for promotion; (3) was not promoted: and (4) was passed over for an available promotion in favor of someone younger." Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1542 (10th Cir. 1987). The district court held that Bowman could not make out this prima facie case because he could not demonstrate that he was qualified for the promotion. For largely the same reasons set forth above in the Title VII analysis, we agree.

Moreover, even if Bowman could have proved his prima facie case, we think summary judgment still would have been proper. Like most circuits, the Tenth Circuit requires ADEA plaintiffs to show more than the prima facie case in order to survive summary judgment. See Marx v. Schnuck Mkts., Inc., 76 F.3d 324, 327 (10th Cir. 1996) (granting defendant summary judgment on a ADEA claim even though plaintiff had established a prima facie case, on the grounds that plaintiff's pretext evidence did not allow for an inference

of age discrimination); see also Conner, 121 F.3d at 1397 n.6 (citing cases from other circuits which have also held that ADEA plaintiffs must move beyond the prima facie case to survive summary judgment). As in the Title VII context, ADEA plaintiffs must produce some evidence showing that the defendant's proffered explanation for the failure to promote was pretextual, or must demonstrate in some other way that the defendant acted with discriminatory intent. See Marx, 76 F.3d at 327. For substantially the same reasons discussed above, in the Title VII section, we think Bowman has failed to make such a showing.

First, the record demonstrates that the reason proffered–lack of qualifications–was not pretextual. Second, of the ten applicants interviewed by the Tax Commission, five of them were over 40 years old, and thus members of the protected age group, and four of those five were over 50 years old. Two of the three candidates initially offered Auditor I positions were 50 or older, although the 50-year-old male was eventually disqualified. Put simply, the record simply does not contain any evidence which tends to show that the Tax Commission's proffered reason was pretextual' indeed, the evidence tends to show that the Tax Commission acted without discriminatory animus. Therefore, we conclude that the district court properly entered summary judgment in favor of the Tax Commission on the ADEA claim.

CONCLUSION

Accordingly, we AFFIRM the district court's grant of summary judgment in favor of the Tax Commission on all counts.

11

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

APPENDIX "D"
MOTION FILED FEBRUARY 5, 1998

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

CECIL BOWMAN,	)
	)
Plaintiff,	)
	)
v.	)No. CIV-97-701-L
	)
ROBERT ANDERSON, in his capacity as the Chairman of th OKLAHOMA TAX COMM..	)
	)
Defendant.	)

MOTION TO RECONSIDER
AND BRIEF IN SUPPORT

Plaintiff respectfully moves the Court to reconsider the judgment rendered on January 26, 1998. Rule 52(b) Federal Rules of Civil Procedure.

STATEMENT OF ERROR

This Court erroneously found that "... plaintiff has

failed to show that he was qualified for the position of Auditor I."

PLAINTIFF WAS QUALIFIED FOR AUDITOR I AS A MATTER OF LAW

In Plaintiff's Response to Defendant's Motion for Summary Judgment, page 1, Plaintiff states "**At all times material, Plaintiff was fully qualified for the position of Auditor I and, his qualifications had been approved by the Office of Personnel Management.**" Emphasis ours. This Court's decision is in error, as Plaintiff was qualified as a matter of law. Specifically, Title 74 O.S. § 840-4.14 reads:

> A. In establishing employment lists of eligible persons for competitive and noncompetitive appointment, certain preferences shall be allowed for honorably discharged veterans as defined by Section 67.13a and Section 67.13b of Title 72 of the Oklahoma Statutes. In determination of the register rank:
>
> 3. Ten points shall be added to the final grade of any war veteran as defined in Section 67.13a of Title 72 of the Oklahoma Statutes who has passed the examination and has submitted proof of having a service-connected disability as certified by the Veterans Administration or agency of the Defense Department within six (6) months of date of application. Such veterans' names shall be placed at the top of the register in accordance

with their numerical rating if in receipt of benefits payable at the rate of thirty percent (30%) or more and such veterans shall not be denied employment and passed over for other veterans or non-veterans, without showing cause. Acceptable cause shall included a reasonable expectation of the inability of the preferenced applicant to satisfactorily perform at the required level of the position and shall be reviewed in each instance by the Administrator of the Office of Personnel Management. If the Administrator finds that acceptable cause for the denial of employment to the preferenced applicant does not exist, the appointing authority shall be required to hire the preferenced applicant. The position shall not be permanently filled until the Administrator has issued his findings.

***66094** B. War veterans, as defined by Section 67.13a of Title 72 of the Oklahoma Statutes, who have been awarded the Purple Heart or have a service-incurred disability rated by the Veterans Administration or a branch of the Armed Forces of the United States and who have been a resident of Oklahoma for at least one (1) year prior to the date of the examination, shall be authorized to open any closed register established by the Merit System of Personnel Administration.

C. Subsection A of this section shall not apply to special disabled veterans who are considered for employment under the

> provisions of Sections 401 through 404 of Title 72 of the Oklahoma Statutes. Provided, said veterans may elect instead to be considered for employment according to the procedures set out in this section.

Exhibit "B" to Plaintiff's Response to Defendant's Motion for Summary Judgment contains 14 different letters from the State of Oklahoma Office of Personnel Management which show that Plaintiff was qualified for subject position. **Exhibit "B" also shows that Plaintiff was tested and passed the test to become eligible to compete for the subject position**. (Emphasis added) There is no dispute that Plaintiff is a "war veteran" pursuant to Title 72 O.S. § 67.13 and § 840-4.14A3, B, and C. **He passed the test required for subject position.** (Emphasis Added). Now the Defendant claims that there was some error --- what was the error? Certainly, there is no claim that he was awarded an erroneous test score when he took the examination. Not only was he qualified for the position, but he was entitled to preference for the position:

NOTES OF DECISIONS

1. Promotions

> In the event registers are established, veterans preference provided for in merit system of Personnel Administration applies to promotions for eligible state employees in competitive and noncompetitive positions as well as to the initial hiring of such employees. Op.Atty.Gen. No. 86-1 (June 24, 1986).

2. Opening closed registers

> This section only authorizes war veterans as defined in Title 72, Sec. 67.13a who have either been awarded the purple heart or have a service incurred disability rated by the Veterans Administration or a branch of the Armed Forces of the United States to open any closed register established by the Merit System of Personnel Administration. Op.Atty.Gen. No. 84-48 (June 12, 1984).

Emphasis ours.

Title 74 O.S. § 840-4.14, **ANNOTATIONS**.

Respectfully submitted,

S/Lewis Barber,Jr.
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Oklahoma City, OK 73111
Ph: (405) 424-5201
Fax: (405) 427-9922

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 1998, a true and correct copy of the above and foregoing document was mailed, postage prepaid, to the following:

John Grissom, Jr.
Assistant General Counsel
Oklahoma Tax Commission
P.O. Box 53248
Oklahoma City, OK 73152-3248

S/Lewis Barber